SUPREME COURT, U. S.
JAN 13 1969
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 172

ELMER L. DIRKS, Individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RY. CO., a Corporation,

Petitioners,

vs.

W. L. BIRKHOLZ, RAY GRANGER, THOMAS FOLEY, DAVID TUCIBAT, WAYNE BLACKBURN and MARVIN HOISINGTON, Individually and in Behalf of All Members of the Switchmen's Union of North America, AFL-CIO, Who Are Employed by The Chicago, Milwaukee, St. Paul & Pacific Ry. Co., and SWITCHMEN'S UNION OF NORTH AMERICA, an Unincorporated Association,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

DAVID PREVIANT
DAVID LEO UELMEN,
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorneys for Petitioner Dirks

JOHN J. NAUGHTON,
120 West Madison Street
Chicago, Illinois 60602

CLIFFORD D. HAWLEY,
666 Euclid Avenue
Cleveland, Ohio 44114

Attorneys for Petitioner Brotherhood of Railroad Trainmen

JAMES P. REEDY,
516 West Jackson Boulevard
Chicago, Illinois 60606
Attorney for Petitioner Chicago Milwaukee, St. Paul & Pacific Railroad Co.

Of Counsel:
GERRY M. MILLER,
GOLDBERG, PREVIANT & UELMEN
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

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STATEMENT

Effective January 1, 1969, a new labor organization known as the United Transportation Union ("UTU") was created through unification of four of the five "standard" operating unions: namely, the Brotherhood of Railroad Trainmen, Switchmen's Union of North America, Brotherhood of Locomotive Firemen & Enginemen and Order of Railway Conductors & Brakemen. The Brotherhood of Locomotive Engineers was not a party to the merger and remains a separate labor organization "national in scope". The unification agreement, entered into in August, 1968, was subject to ratification and ap-

proval through a referendum vote of the membership of each of the four organizations. The final tally on membership approval was announced on December 10, 1968. Certain litigation in Florida, seeking to restrain the unification, has been dismissed by the United States District Court, and we know of no other litigation challenging unification of the four operating brotherhoods into the UTU.

Unification of the Trainmen and SUNA ends the competition for membership between them and, since the UTU succeeds to the interests of each organization in this action, moots the controversy as to them. However, in our opinion the controversy in this case between the individual plaintiffs and the class they represent and the Trainmen has not been mooted as a result of unification and, under established precedent, presents a viable controversy for this Court now to determine.

The individual plaintiffs, suing individually and on behalf of all members of SUNA employed by the Milwaukee Road, allege that many of them held valuable insurance rights dependent upon continued membership in SUNA, which would be lost if they were required to comply with the challenged union shop agreement (A. 9). They also allege that petitioners unlawfully interfered with their membership in SUNA which represented a contract and property right valuable to them (A. 11). The prayer for relief sought temporary, preliminary and permanent injunctive relief restraining petitioners from effectuating the challenged union shop agreement by discharging or threatening to discharge members of SUNA for failing to maintain membership in the Trainmen (A. 11-12). The prayer for relief sought damages payable to SUNA of $100,000 and included a

request for such other and further relief as the case may require (A. 12).

Respondents were unsuccessful in all of their efforts to restrain effectuation of the challenged union shop agreement. Their motion for temporary restraining order was denied on February 23, 1967 (A. 1). Their application for preliminary and permanent injunctive relief was denied on April 4, 1967 (A. 2). Therefore, the challenged union shop agreement, made on February 1, 1967, became effective on March 1, 1967 and compelled employees to acquire and retain membership in the Trainmen within sixty calendar days thereafter (A. 92, 100). The decision of the court below, reversing the judgment of the District Court was entered on February 12, 1968 (A. 122).

During the period following March 1, 1967 virtually all members of the class represented by the individual plaintiffs applied for membership in the Trainmen under protest. One protest advised the Trainmen that the employee:

> ". . . will look solely to the . . . Trainmen . . . for reimbursement of all fees, dues, assessments, taxes and other moneys paid into said brotherhood plus interest thereon from this date forward. And mark it well that at this time when my presently held position regarding the [illegality of] said agreement have been vindicated by the decision of said court, the undersigned fully intends to pursue a legal course of action either alone or in concert with others who have been harmed in like manner to regain and recover said moneys."

The full text of a typical protest received by the Trainmen, containing this language, is incorporated herein as Exhibit "A". Many others wrote notes on their dues

checks and separately that they were paying dues to the Trainmen "under protest", thus preserving their claim for reimbursment.

Respondents' brief to the court below expressly alluded to damages allegedly incurred by the individual plaintiffs as a result of the unrestrained operation of the challenged union shop agreement and specified with particularity the damages now claimed on their behalf:

> "The plaintiffs accordingly ask this court to reverse the judgment below and remand with directions to issue a judgment, . . . awarding such damages as the plaintiffs may be able to prove including any wages lost by discharges for failure to join and maintain membership in the defendant Trainmen's Union, dues losses suffered by members of the plaintiff Switchmen's Union for dues paid to the defendant Trainmen's Union by persons electing to continue membership in both the Switchmen's Union and the Trainmen's Union to avoid discharge, dues losses suffered by members of the plaintiff Switchmen's Union and other employees by payment of initiation fees and dues to defendant Trainmen's Union by persons who were coerced to join or maintain membership by reason of the illegal shop contract, [and] insurance losses suffered by employees who, as a result of the illegal union shop agreement, dropped their membership in the Switchmen's Union and thus lost insurance benefits because they could not afford to pay dues to two unions . . ."
> (Brief for Plaintiffs-Appellants, p. 3)

Such claims are, of course, encompassed by the prayer for general relief in the complaint and, in any case, may be awarded under Rule 54(c) of the Federal Rules of Civil Procedure. Neither the demands set forth in the letters or protest nor the relief sought by respondents upon remand have been withdrawn.

ARGUMENT

These claims for monetary awards, particularizing the other and further relief to which the individual plaintiffs now deem themselves entitled, present a "continuing controversy" for this Court now to determine. *Textile Workers Union v. Lincoln Mills,* 353 US 448, 459 (1957).

Moreover, the question presented in this case has retained its importance in that the Brotherhood of Locomotive Engineers remains a separate organization and, under the decision below, operating employees represented by either of the remaining "standard" organizations must be permitted to join the rival even though it does not contract with the carrier. Finally, since the law provides a procedure for other organizations becoming electors of labor members on the First Division and thus eligible for alternate membership privileges under § 2, Eleventh (c), unification does not preclude the involvemnt of other organizations in the question.

CONCLUSION

Based upon the foregoing the petitioners respectfully assert that the issues and controversies should be determind by the Court at this time and request the Court to reverse the judgment below.

Respectfully submitted,

DAVID PREVIANT
DAVID LEO UELMEN,
Attorneys for Petitioner Dirks
JOHN J. NAUGHTON,
CLIFFORD D. HAWLEY,
Attorneys for Petitioner
Brotherhood of Railroad Trainmen
JAMES P. REEDY,
Attorney for Petitioner Chicago
Milwaukee, St. Paul & Pacific
Railroad Co.

Of Counsel:
GERRY M. MILLER,
GOLDBERG, PREVIANT & UELMEN

EXHIBIT "A"

April, 1967

Secretary-Treasurer
Brotherhood of Railroad Trainmen
Lodge #804

Dear Sir:

I, the undersigned, a switchmen in service on the Chicago, Milwaukee, St. Paul and Pacific Rialroad, per the agreement made between your Brotherhood and the Railroad on February 1, 1967, and per the enclosed application blank for membership in your Brotherhood, do hereby make formal application for such membership.

Let it be known by this letter, a copy which is retained in my files, that the undersigned make such application for membership in your brotherhood, soley and strictly under the most vehement of protest. The undersigned sincerely believes that he has been denied his constitunially guarteed exercise of freedom and free choice in association with whom he desires and, upon advice from legal counsel, verily believes that the afore-mentioned agreement flies in the face of the plain language of Section 2, Eleventh (c) of the Railway Labor Act and is thus, illigal, unlawful, not binding and unenforceable. However, to ensure against his loss of seniority on the basis of not having acquired membership in your organization and, solely for that reason, the undersigned will comply with the alleged, but seemingly unlawful requirement stated in the agreement.

Let it be further perfectly and clearly understood, that since this application and the application fee are being tendered under-protest, all dues, assessments, fees, taxes and the like, required to be paid into the Brotherhood of Railroad Trainmen by the undersigned, until such time as it should be adjudged by a final Court of competent jurisdiction that the afore-mentioned agreement is legal and binding upon me, will be paid into the Brotherhood, likewise, under protest.

Further, should a final court of competent jurisdiction adjudge that said agreement is illegal and was so, ab initio and, thus, apposed the presently stated contention and thought of the undersigned, your writer will look solely to the Brotherhood of Railroad Trainmen, its agents and officers and its Local to which the undersigned will be coerced into belonging, for reimbursements of all fees, dues, assessments, taxes and all other monies paid into said Brotherhood, plus interest thereon, from this date forward. And mark it well at this time that when my presently held position regarding the said agreement, will have been vindicated by the decision of said Court, the undersigned fully intends to pursue a legal course of action, either alone are in concert with others who have been harmed in like manner, to regain and recover such monies.

Finally and, to set the record straight, the undersigned is not applying, conditionally, for membership in your brotherhood. He fully intends to be a law-abiding, including capital by-laws and other rules laid down by the brotherhood, dues-paying, card-carrying, member of your brotherhood; he holds no reservations, mental, secret, or otherwise impicit or explicit, in seeking membership or in carrying out the duties and requirement of said membership, he only believes that since coercion, presure and other imorals, if not unlawful, means were used on him to exact compliance with the agreement afore mentioned, to preserve his own self-honesty, self-worth and personal integrity, he would less than forthright were he to apply for said membership and to belong to your brotherhood, in silence.

Sincerely yours,

[*Misspellings in the original*]